The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 06-27 September 7, 2006

Petition of The Berkshire Gas Company for approval by the Department of Telecommunications and Energy, pursuant to G.L. c. 164, § 94A, for approval of a gas sales agreement between The Berkshire Gas Company and Coral Energy Resources, L.P.

HEARING OFFICER RULING ON MOTIONS FOR PROTECTIVE ORDER

I. INTRODUCTION AND PROCEDURAL HISTORY

On February 28, 2006, The Berkshire Gas Company ("Berkshire" or "Company"), pursuant to G.L. c. 164, § 94A, submitted a petition for approval, by the Department of Telecommunications and Energy ("Department"), of a gas sales agreement between Berkshire and Coral Energy Resources, L.P. ("Coral"). With its petition, the Company filed a Motion for Protective Treatment ("Motion") seeking protective treatment of certain confidential and competitively sensitive information, i.e., pricing terms of the contract and pricing information submitted in responses to the Company's request for proposals ("RFP").[1] The Attorney General did not object to the Motion. I granted the Motion during the public hearing on March 28, 2006, and set sunset dates for the protective treatment of the respective materials. For the pricing terms of the contract, I set a sunset date equal to the term of the contract, seven years, or the date the Federal Energy Regulatory Commission ("FERC") releases the information, whichever first occurs (Tr. at 5-6). For pricing information submitted in the responses to the Company's RFP, I set a sunset date of five years (Tr. at 6).

Subsequently, on April 25, 2006, and again on April 28, 2006, May 12, 2006, and May 31, 2006, in cover letters submitted with the Company's responses to Information Requests and Record Requests posed by both the Department and the Attorney General (collectively "Cover Letters"), the Company, for the reasons stated previously in the Motion and pursuant to G.L. c. 25 § 5D, requested that protective treatment be extended to "all items

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[1] Specifically, the Motion sought protective treatment for: (i) portions of the Sales Agreement (the Confirmation and Letter Agreement, attached to pre-filed testimony and marked JMB-1 and JMB-2 respectively), and (ii) documents related to the RFP including analysis and ranking of bids marked as JMB-8 and JMB-9.

related to contract price and certain information relating to the solicitation as reflected in the redacted responses to Information Requests."

On May 22, 2006, the Company filed a Supplemental Motion for Protective Treatment ("Supp. Motion"), seeking protective treatment of certain other confidential and competitively sensitive information submitted both in the Company's responses to information requests posed by both the Department and the Attorney General as well as some of the information requests themselves. This information includes legal analysis of contract terms of an Amended Fuel Purchase Agreement ("AFPA") with the operator of a cogeneration plant in Pittsfield, Massachusetts as well as potential strategies related to the loss of the AFPA. This Supplemental Motion offered reasons for granting this information protective treatment that differed from the pricing information for which protective treatment had previously been sought and granted. The Attorney General did not comment on the Supp. Motion. This Hearing Officer Ruling addresses these motions and defines the protective treatment to be afforded.

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> [T]he [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third,

even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

III. BERKSHIRE'S POSITION

In the Motion, which seeks protective treatment for the pricing information submitted in its Petition, Berkshire asserted that leaving such pricing information available to the public and thereby its competitors, and the competitors of its suppliers and transporters would be highly inappropriate (Motion at 3). Berkshire argued that such disclosure may put Berkshire at a bargaining disadvantage in future negotiations with potential suppliers and transporters as such entities knowing the exact price of Berkshire's current resources could use those prices as benchmarks, making more advantageous contracts less likely (id.).

Similarly, the Company's Cover Letters, requesting to extend the protective treatment granted pursuant to its Motion to "all items related to contract price and certain information relating to the solicitation as reflected in the redacted responses to Information Requests," support the Company's request by pointing to the reasons stated in its Motion.

In its Supp. Motion, Berkshire seeks "protective treatment for materials relating to the interpretation of the AFPA and the implications of the terms and conditions of the [AFPA]"

(Supp. Motion at 3).[2] These materials are listed on Schedule A attached to the Supp. Motion. Berkshire argues that public disclosure of this information could "[adversely] affect the rights and interests of the Company" (id.). Berkshire contends that public disclosure of this material would be "highly inappropriate" (id.). Berkshire further argues that the information, if unprotected, may place Berkshire "at a bargaining disadvantage in . . . negotiations with the [other] party to the FPA" and may adversely affect the Company's ability to pursue claims potentially resulting in higher prices for service to the Company's customers (id.).

IV. ANALYSIS AND FINDINGS

Berkshire bears the burden of proving that the information for which protection is sought constitutes trade secrets, or confidential, competitively sensitive, or proprietary information. G. L. c. 25 § 5D. I previously found that the Company had met its burden with regard to pricing information contained in the Company's initial filing and for which the Company sought protective treatment pursuant to the Motion.

The pricing information contained in the Company's responses to Information Requests DTE 1-4, DTE 1-13, AG 1-4, Att. (b), AG 2-3 and 2-4, is of the same kind and character as that previously granted protective treatment. Accordingly, I find that the prices of gas supply and/or transportation contained in these responses constitute price and competitively sensitive terms that are confidential, proprietary information warranting confidential treatment. Moreover, the public dissemination of this material would place Berkshire, respectively at a competitive disadvantage. Therefore, there appears to be a need for its non-disclosure.

I hereby reaffirm my previous grant of protective treatment sought in the Motion and extend such protective treatment granted therein to the Company's responses to Information Requests DTE 1-4, DTE 1-13, AG 1-4 Att. (b), AG 2-3 and AG 2-4. Consistent with the my original grant of the Motion, the same sunset dates shall apply. Protective treatment for DTE 1-4 and DTE 1-13 will expire in five years from the date of this Ruling. The materials in AG 1-4 Att. (b), AG 2-3 and AG 2-4 will expire upon the expiration or earlier termination of

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[2] The Company also notes that Responses to Information Requests DTE 1-4, AG 1–4, and AG 1-11, were redacted to protect confidential price information, and repeats the request that they be granted protective treatment "[f]or the reasons stated in the Motion" (Supp. Motion at 3 n1). Although they were also redacted, the Company's responses to Information Requests DTE 1-13 and AG 2-24 were not listed on Schedule A of the Supp. Motion and therefore, the Supp. Motion does not request protective treatment for these responses. Nonetheless, the Company specifically requested protective treatment of these responses in Cover Letters, specifically the letters dated April 25, 2006 and May 12, 2006, respectively.

the contract, seven years from the date of this Ruling, or at such time as FERC releases the information, whichever first occurs.

I also find that some of Berkshire's Responses to Information requests, and indeed some of the Attorney's General's requests themselves reveal sensitive information related to legal interpretations of contract provisions, potential claims and legal strategies for protecting or pursuing the Company's interests and discussion of the merits of those claims and strategies. Public Disclosure of this information would compromise the Company's ability to protect its interest (and those of its customers) and to pursue such claims.

Therefore, I find that there is a need for protective treatment of this information included in the Company's Responses to the following Information Requests: AG 1-18 (Supplemental), AG 2-10, AG 2-11, AG 2-12, AG 2-13, AG 2-14, AG 2-15, AG 2-16, AG 2-17, AG 2-18, AG 2-19, AG 2-21, AG 2-22, and AG 2-36.

I also find that the following Information Requests themselves reveal confidential, proprietary information and should be protected from public disclosure: AG 2-10, AG 2-11, AG 2-12, AG 2-13, AG 2-14, AG 2-15, AG 2-16, AG 2-17, AG 2-18, AG 2-19, AG 2-21, AG 2-22, and AG 2-36.

However, in some cases, the Company has redacted entire documents. For example, in its response to DTE 1-4 the Company omitted from its public filing, copies of ten positive responses to the Company's RFP in their entirety. The Department may protect only so much of the information as is necessary to meet such need. G.L. c. 25 § 5D. Therefore, such blanket protection of these materials is unwarranted. Accordingly, the Company is directed to file revised redactions of the following materials for the public docket: DTE 1-4 Att. (a), DTE 1-13 Att., AG 2-3, and AG 2-4. The Company may redact competitively sensitive information such as specific pricing and volumes. However, non-sensitive information such as table borders and headings or company letterhead and address information should not be redacted.

In addition, Information Request AG 2-10 and the Company's response to it contain non-sensitive information already revealed in responses to other Information Requests, for which the Company has not sought confidential treatment and which are therefore already available to the public. Accordingly, confidential treatment of this response would be inappropriate and is hereby denied.

V. RULING

Accordingly, after due consideration, I find that (i) my Hearing Officer's ruling granting the February 28, 2006 Motion is hereby reaffirmed, (ii) the Company's subsequent requests to extend such protective treatment are GRANTED in part and DENIED in part, and

(iii) the Company's Supplemental Motion is GRANTED in part and DENIED in part as specified above. This Ruling will apply to the materials as specified above as well as to any briefs referencing such materials or information contained therein which has been granted protective treatment. The protective treatment granted herein will expire as explained above: for pricing information submitted in the responses to the Company's RFP: five years from the date of this Hearing Officer Ruling; for pricing information of the contract: upon the expiration or earlier termination of the contract, seven years from the date of this Ruling, or at such time as FERC releases the information, whichever first occurs; and for legal analysis and legal strategy found in both the information requests and responses to information requests outlined in the Supp. Motion: four years from the date of this Hearing Officer Ruling. Within ten days, consistent with this Ruling, Berkshire must file, revised redactions of the materials outlined above for the public docket.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. Responses to any appeal must be filed within two (2) days of the appeal.

/s/
John J. Keene, Jr.
Hearing Officer

cc: Mary L. Cottrell, Secretary
Service List (*via e-mail and regular mail*)